United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Set 6-6-77

ORIGINAL

74-2352

To be argued by
DAVID W. FISHER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTICE, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants

-against-

THE CITY OF NEW YORK; ABRAHAM BEAME, AS MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY, HARRY BRONSTEIN, AS CITY PERSONNEL DIRECTOR: NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH NOSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF APPELLEES: THE CITY OF NEW YORK; ARBRAHAM BEAME, AS MAYOR OF THE CITY OF NEW YORK: HARRY BRONSTEIN, AS CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORAITON; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBISNON, J., MARY E. MEADE, CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

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THE CITY OF NEW YORK: ABRAHAM BEAME, as Mayor of the City of New York; JOHN V. LINDSAY, HARRY BRONSTEIN, as City Personnel Director; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the Board of Education of The City of New York; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

STATEMENT OF THE CASE

Preliminary Statement

This alleged class action was commenced by the filing of a complaint on January 17, 1974, seeking declaratory and injunctive relief and money damages. The plaintiffs-appellants are a women's group and individually named women plaintiffs who became or were capable of becoming pregnant, and a male claiming to represent male employees suing on behalf of their famale dependents who became or were capable of becoming pregnant. The plaintiffs claim that the defendants' practices violate the United States Constitution, the Civil Rights Acts of 1886 and 1964, The New York State Constitution, The New York City Administrative Code and New York City Mayoral Executive Order #71 (April 2, 1968) and #23 (August 24, 1970). The Defendants-Appellees are the City of New York, four of its governmental units, three municipal unions and their respective employee welfare funds and two of the three insurance carriers that provide health coverage for municipal employees.

After the municipal defendants answered and moved to dismiss the complaint a hearing was held on July 11, 1974 before Hon. Whitman Knapp, where the court sua sponte dismissed the complaint with leave to replead, in order to set forth allegations that the plans and policies

were adopted as pretext designed to effect sex discrination, and certified the following question to this Court pursuant to 28 U.S.C. §1292(b):

> "Whether Aiello has established--for the purpose of (this) action- that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment." (303a)

This Court, by an order entered October 2, 1974, denied plaintiffs' petition for leave to appeal. The plaintiffs notified the district court that they did not intend to amend their complaint. Subsequently, on October 10, 1974, the complaint was dismissed at plaintiffs' request and by notice of appeal of the same date plaintiffs appealed to this Court.

This Court summarily vacated the order of dismissal and remanded relying on the decision in Communications Workers of America v. American Telephone & Telegraph Co., 513 F. 2d 1024 (2d Cir. 1975). Two of the defendant unions, The United Federation of Teachers and the Social Service Employees Union Local 371, and their respective welfare funds petitioned for certiorari.

While the petitions for certiorari were pending, the Supreme Court decided General Electric Co. v.

Gilbert, 429 U.S. _____, 97 S. Ct. 401 (1976) holding that its ruling in Gedulig v. Aiello was precisely on point in holding that an exclusion of pregnancy from a disability benefits plan is not a genderbased discrimination at all.

Thereupon, the Supreme Court granted the four defendants' petitions for certiorari, vacated this Court's order vacating dismissal, and remanded the case back to this court for reconsideration in light of the decision in the General Electric case.

Facts

There are three distinct aspects to plaintiffs' allegations in the complaint. The first, second and third causes allege that the health and hospitalization plans provided by the City to its employees offers fewer benefits for pregnancy and pregnancy-related conditions than for other medical and surgical problems requiring hospital and medical care (27a-35a).* Plaintiffs' fourth, fifth and sixth causes of action allege that the union welfare funds paid with funds provided by the City treated disability resulting from pregnancy differently from other medical and surgical conditions (36a-39a). Finally, the seventh through eleventh causes of action allege that the City treats maternity leaves

*Page references ending in "a" refer to pages in the Joint Appendix on Appeal

from leaves taken for other medical and surgical purposes (39a-42a).

(a)

The City of New York provides its employees with a basic health insurance program without cost to the employee, but at a cost of approximately $135,000,000 annually to the City (208a). This program is composed of two distinct portions, a hospitalization policy and a medical care policy. The hospitalization part is the same for all employees and is underwritten by defendant Associated Hospital Services of Greater New York (Blue Cross) (208a). For medical care, the employee has an option of choosing one of the following three plans: Group Health Insurance Major Medical (G.H.I., Type E), the successor to Blue Shield Major Medical, which is operated as separate entity from the second plan, Group Health Insurance (G.H.I.). The third plan is operated by Health Insurance Plan (H.I.P.) which is not a party to this action (209a). In addition, the employee may choose additional coverage at a nominal fee. The plan and the optional benefits are fully explained in "A Choice of Health Plans." (213a).[1] The optional Benefits are not involved in the litigation.

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[1] Appellants are well aware of the enclosed booklet "A Choice of Health Plans" and have in fact based this litigation upon certain provisions therein. This booklet is, of course, made available to all City employees for them to understand their health benefits.

The basic Blue Cross coverage (213a) for City employees provides 21 days of full hospital coverage and 120 days at a 50% rate. There are limitations on the program such as an $80 maximum hospital payment for a normal maternity delivery. In the event of a caesarean section delivery, spontaneous termination of pregnancy during the first six months, an ectopic pregnancy, and certain other surgical terminations, regular hospital benefits are provided from the date of termination. Pregnancy is not the only limitation in the hospitalization coverage. Benefits for polio, certain communicable diseases, pulmonary tuberculosis, mental disorders and removal of tonsils or adenoids are also limited. There is also a $7.25 payment limitation for emergency first aid and use of a hospital's operating room facilities while not a registered bed patient.

The medical care plans are as follows:

G.H.I. provides a scheduled allowance for all conditions with a broad program of limitations. G.H.I's schedule, however, is accepted in full by more than 9,000 participating physicians in the New York metropolitan area and maternity benefits are provided in full if a participating family doctor is used (2132).

G.H.I. Type E is a scheduled allowance plan with the addition of a major medical allowance. This plan contains a limitation on normal maternity delivery, which

is not considered a covered medical expense under the major medical portion of the policy. There are other limitations in this program: immunization, physical checkups or related diagnostic tests, well-baby care, outpatient psychiatric care and certain foot conditions (213a).

The City plan offers H.I.P. as a third option. H.I.P., which any City employees can elect, provides full maternity coverage to employee or dependent through its system of group practice. This plan involves no deductible, no co-insurance, no claim forms and no out-of-pocket expenses (213a).

All of the health insurance plans provide the same coverage to the defendants of the employees as to the employees themselves (213a), i.e., the male employee receives the same $80 hospitalization allowance for normal delivery for his wife as does the pregnant female employee receives for herself.

(b)

The union welfare funds are funded by contributions from the City of $350 per annum for each employee in a title covered by the union at a total cost of $100,000,000 annually (211a). The funds may then be used by the unions, as representative of the employees, to purchase such additional benefits as they see fit to supplement the City's health program or to provide other

benefits. For example, the Faculty Conference of the City University of New York provides full maternity benefits and the Policemen's Benevolent Association provides an additional $70 maternity benefit (211a). This coverage is extended to all employees in the title covered by the union whether the employee is a member of that union or not. Certain unions have chosen what is commonly known as disability coverage as part of the additional benefit to be offered to the covered City employees while other unions offer no such benefits. The disability coverage offered by each union is unique to that union (211a).

One defendant union welfare fund (Social Services Employees Union Welfare Fund) does offer to its covered employees benefits for pregnancy-related disabilities and has made payments arising from pregnancy-related disabilities of several of the named plaintiffs (114a-118a).

(c)

The remainder of the plaintiffs' complaint deals with the maternity leave policies of the municipal defendant which are no longer in effect (59a, 60a). In addition, these former policies were litigated during the pendency of this case in the case of Monell, et al. v. Department of Social Services, et al., 394 F. Supp. 853 (S.D. N.Y., 1975), affd. 532 F. 2d 259 (2d Cir. 1976), cert. grant. ____ U.S. ____, 97 S. Ct. (1977).

ARGUMENT

THERE ARE NO ALLEGATIONS EVINCING SEX DISCRIMINATION ON THE PART OF APPELLEE GOVERNMENTAL AGENCIES OR OFFICIALS WITH RESPECT TO EITHER DISABILITY BENEFITS ADMINISTERED BY DEFENDANT WELFARE FUNDS OR HOSPITAL AND MEDICAL BENEFITS CONTRACTED FOR BY THE GOVERNMENT. THE ISSUES WITH RESPECT TO LEAVE POLICIES ARE MOOT, THE POLICIES HAVING BEEN CHANGED PRIOR TO THE INSTITUTION OF THIS LAWSUIT.

I. THE DECISION IN GENERAL ELECTRIC V. GILBERT, 429 U.S. ____ WHICH DECIDED THAT DISTINCTIONS BASED ON PREGNANCY ARE NOT SEXUALLY DISCRIMINATORY IS DISPOSITIVE OF THE ISSUES IN THE INSTANT CASE.

(a)

In General Electric Co. v. Gilbert, 429 U.S. ____, 97 S. Ct. 401 (1976) the Supreme Court held that its decision in Gedulig v. Aiello, 417 U.S. 484 (1974) holding that disparity in treatment between pregnancy-related and other disabilities was not sex discrimination under the Equal Protection Clause of the Fourteenth Amendment, was applicable in a Title VII context. Gedulig involved a state sponsored disability plan funded by contributions from the employees whereas the G.E. plan was a company operated plan but was otherwise similar to the Gedulig plan.

The Court in General Elec. Co. quoted extensively from its decision in Gedulig where it rejected the employees Eqaual Protection Clause challenge to the statutory benefit scheme: 97 S. Ct. at 407.

"We cannot agree the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure."

and this point was further emphasized.

"This case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition--pregnancy--from the list of compensible disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively indentifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."

"The lack of identity between the excluded disability and gender as such becomes clear under the most cursory analysis. The program divides potential recipients into two groups--pregnant women and non-pregnant persons. While the first group is

> exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. 417 U.S. at 496-7 n. 20"

The Court took note that a distinction which on its face is not sex related might nonetheless violate the Equal Protection Clause if it were in fact a subterfuge to accomplish a forbidden discrimination, [illegible]laim that was not pleaded by the plaintiffs in the instant [illegible] even though given a chance to do so by the court be[illegible]. But in a program excluding pregnancy there is "no question of excluding a disease or disability comparable in all other respects to covered diseased or disabilities and yet confined to the members of one race or sex. Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability." General Elec. Co. 429 U.S. ____, 97 S. Ct. at 408.

The fringe benefits package in the General Elec. Co. case was found non discriminatory as in Gedulig where G.E. employees, male and female, receive the same exact coverage of risk and "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Gedulig, 417 U.S. at 496-49.

The Court in General Elec. Co. went on to state that pregnancy related disabilities constitute an additional risk unique to women, and the failure to compensate

for this risk does not make the plans unequal which results from the facially evenhanded inclusion of risk. To hold otherwise would result in a situation where an employer with a plan could be liable and an employer who had no plan at all would not violate Title VII even though the underinclusion of risks impacts, as a result of pregnancy, more heavily upon one gender than upon the other. The Court took note that the employees in the General Elec. Co. case acknowledged that G.E. has no obligation to establish any fringe benefit program. General Elec. Co. 97 S. Ct. 401 N. 18.

The district court's decision in this case is clearly correct in light of the decisions in Gedulig and General Elec. Co. and should be affirmed, as there is no showing of mere pretexts designed to effect invidious discrimination. There is no gender based descrimination due to the employer's disability benefits plan being less than all inclusive. General Elec. Co. 97 S. Ct. at 409.

(b)

The union welfare funds are funded by contributions from the City of $350[2] per annum for each employee in a title covered by the union (211a). These funds are

[2] An increase of $50 from the former amount of $300 effective July 1, 1974.

then used by the unions as representative of the employees to purchase such additional benefits as they see fit to supplement the City's employees insurance program. All employees in the covered titles receive the same benefits whether or not they are members of the union. These benefits cost the City in excess of $100,000,000 anually (211a) and concessions have been made by certain unions to reduce the cost to the City of this fringe benefit during the City's budget crises.

The following should be emphasized:

(a) Appellee governmental agencies have no disability payment plan for their employees. Instead, such employees, if disabled, have sick leave benefits, workmen's compensation benefits, and annual leave benefits.

(b) The disability plans under attack in this case are administered by various welfare funds comprised of trustees appointed by the union. The union plans have no relation to one another. The trustees decide what benefits shall be given, which benefits may include dental insurance, prescription drugs, optical plans, or life insurance. Illustrative of this is the fact that the Faculty Conference of the City University of New York provides full benefits for maternity coverage. The Police Benevolent Association provides an additional $70 maternity benefit for maternity (211a). The City's role is to allocate a specific sum of money for each employee in various titles to the union and the union decides on

what benefits are to be offered. In addition, the union can provide benefits of its own, funded by the dues it receives from its members.

(c) This Court can take judicial notice that there are thousands of City employees such as attorneys, engineers, nurses, etc. who do not belong to the unions who are defendants in this case, and that their associations or unions may not have chosen to spend their money on a disability payment plan. Assuming one of the defendant unions is compelled to include pregnancy as a disability, such union can simply vote to discard its entire disability payment plan, as the Court suggested in the General Elec. Co. case at n. 17.

As has been stated before, the defendant Social Services Employees' Union Welfare Fund does have a disability payment plan which covers pregnancy in a change of policy made unilaterally prior to the institution of this litigation and has made payment arising from pregnancy-related disabilities of several of the named plaintiffs (114a-119a). Such a policy change permitting coverage for pregnancy-related disabilities undertaken unilaterally by this welfare fund shows the control of the Union over the use of its welfare fund and disproves the allegation that it is the City that is discriminating against its female employees.

In creating benefit programs, the City arrives at a balanced program of many benefits which they believe

are the best possible to serve overall employee needs. Any such package, obviously, cannot meet all employee needs. The City must carefully allocate its limited and strained resources in order to obtain for its employees the best possible policy package. Nevertheless, in comparison to the programs of other governmental agencies, the City's program is most generous. In addition to the City-wide health package, the City uniquely advances the welfare of its employees by its contributions to the various municipal union welfare funds, thereby allowing City employees to choose their own additional coverage.

A ceiling must exist in all fringe benefit packages. In the present case the City and the union welfare funds have chosen to limit some benefits in favor of others. One of the many benefits so limited is the benefit available for pregnancy. Adding additional maternity coverage to the City's insurance policy would cost the City millions of dollars. In view of the City's continuing fiscal crisis, any such additional cost to extend the benefits of just part of one of the covered risks would heavily burden the resources available and might result in the reduction or elimination of other risks now covered. This is unnecessary. The City fringe benefits package as now constituted is legal. See Gedulig at p. 495-6) and General Elec. Co.

II. THE ALLEGATIONS OF THE COMPLAINT RELATING TO HEALTH AND HOSPITAL BENEFITS FAIL TO STATE A CAUSE OF ACTION AND THE DISMISSAL SHOULD BE AFFIRMED BY THIS COURT.

Even before the Supreme Court ruled in the General Electric case in favor of the employer, the argument regarding the discriminatory aspect health and hospitalization plan had been rejected. The G.E. case further shows the weakness in the appellants case.

In Satty v. Nashville Gas Company, 584 F. Supp. 765 (1974), affd. on employer's appeal 522 F. 2d 850 (6th Cir. 1975), cert. granted 97 S. Ct. 806 (1977), the employees brought an action alleging sex discrimination. Amongst the arguments put forward by the female employees was the allegation that the employer discriminated with respect to its employment policy regarding pregnancy in that reduced hospital benefits were paid in the case of pregnancy when compared with hospitalization for other causes. The Court rejected the argument holding that "for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff," and that there was no violation of the EEOC guidelines on fringe benefits (Title 29, Code of Federal Regulations, Section 1604.9(d). It should be noted that the court in Satty granted relief to the female employees on the other issues involved to wit: sick leave, seniority and back pay for sex discrimination in

maternity leave policies.

The guidelines of Equal Employment Opportunity Commission support the city's argument. Section 1604.9 of the Guidelines entitled "Fringe Benefits" states:

> "(d) It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits."

It should also be noted the actions of other federal agencies also support the city's position. Thus, the Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 172) do not require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contribution to such plans for employees of both sexes (41 C.F.R. §60-20-3(e). Moreover, regulations promulgated by the Wage and Hour Administration under the Equal Pay Act 29 U.S.C. 206(4), provide that payments relating to maternity are not wages

for purposes of that statute (20 C.F.R. §800.110), and further state (20 C.F.R. §800.116(d):

> "If an employer's contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments even though the benefits which accrue to the employees in question are greater for one sex than for the other."

The City is in compliance with EEOC guidelines since the City treats all of its employees the same as regards its health insurance and there is no distinction in the application, operation, or effect of the insurance plan. The City provides the same benefits to the female dependents of the male employee as it provides the female employees.

In addition, as to medical plans, the employee can choose the Health Insurance Plan (HIP) which provides full medical coverage for pregnancy and pregnancy-related illness.

As noted above, the Supreme Court in General Elec. Co. recognized that in essence the cost of insurance is nothing more than extra compensation by the employee in the form of fringe benefits and that the employers could remove the fringe benefits and increase the salary by the amount of the insurance, then there would be no gender based discrimination even though it might cost the female employee more to obtain coverage for pregnancy-

related conditions. 429 U.S. ____, 97 S. Ct. 409 N.17.

In this case, the absence of sex discrimination with respect to health and hospitalization benefits is made evident by the fact that one of the plaintiffs-appellants is a male, Robert Sussman, and the class represented includes". . . (b) males employed by the City during the same period of time [April 22, 1968 to the date of the complaint], who, at any time during this period had a wife or female dependent capable of becoming pregnant or who became pregnant" (4a). Thus, the complaint in this respect can be read as claiming the impossible, to wit, sex discrimination against 167,000 male employees and 76,000 female employees who receive the identical City family health insurance program (208a, 213a). Cf. Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973).

III. NO VALID CAUSE OF ACTION EXISTS AGAINST APPELLEE WITH RESPECT TO MATERNITY LEAVE POLICIES AND PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE AND DECLARATORY RELIEF OF MONETARY DAMAGES. MOREOVER, A PRIOR CLASS ACTION HAS BEEN DECIDED BY THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND AFFIRMED BY THIS COURT, ARE DISPOSITIVE OF THE ISSUES CONCERNING SAID LEAVE POLICIES.

The defendant City agencies are not subject to the declaratory and injunctive relief or monetary damages demanded in the complaint as to the maternity leave policies

since this aspect has been rendered moot. The City of New York and the Board of Education now provide the same leave policies to its pregnant employees as to other employees who are ill and there is no mandatory date for beginning a maternity leave.

The changes in the city's leave policy predate the commencement of this action. The City adopted Personnel Order No. 361/72, effective September 1, 1972, which formalized a directive of Deputy Mayor Hamilton, effective January 19, 1972, which amended the leave regulations under the Career and Salary Plan. Appellants are well aware that the former leave policies have been changed and the dates when the new policies were put into effect (39a, 41a). It should also be noted that some agencies such as the Human Resources Administration changed their policies sometime in 1971. The Board of Education, by its by-laws, changed its policy effective September 1, 1973 for employees coming under their jurisdiction.

This Court should take note that even when the defendants' prior policies were in effect, they apparently were honored more in the breach than in their observance. This is shown by the complaint which states that a number of the named plaintiffs commenced their leave concurrently with their confinement, i.e. plaintiff Boyarsky commenced leave March 1, 1973 and gave birth on March 7, 1973 (8a). Plaintiff Cantelmi commenced leave December 23, 1972 and

gave birth on December 29, 1972 (10a). Plaintiff Zises commenced leave on January 3, 1973 and gave birth on that date (13a). Plaintiff Blitz commenced leave on March 15, 1973 and gave birth on that date (14a). Plaintiff Shah commenced leave on November 27, 1972 and gave birth on November 28, 1972 (17a). In addition, almost all of the other named plaintiffs worked beyond the time in which plaintiffs claim the prior leave policies would have compelled them to and therefore have not incurred any damage.

Furthermore, in this case, there should be no award of back pay as prior to the judicial determination in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), declaring that certain mandatory leave provisions were illegal under Title VII, the instant appellee governmental agencies had changed their basic policies, which had been enacted in good faith, so as to correct what was later found to be illegal in LaFleur. See also Williams v. General Foods Corp., 492 F. 2d 399 (7th Cir. 1974); Manning v. International Union, 466 F. 2d 812 (6th Cir. 1972); Kober v. Westinghouse Electric Corporation, 480 F. 2d 240 (3rd Cir. 1973).

Prior to the institution of this suit another action was commenced in the Southern District of New York entitled Monell, et al. v. Department of Social Services of the City of New York (214a) where the maternity leave regulations of

agencies of the city, including the Board of Education, were involved. Appellants even alluded to this case in their complaint (5-6a). The plaintiffs in Monell sought declaratory and injunctive relief and damages for "the deprivation of their right to be employed, including but not limited to wages lost".

The Monell suit, commenced in 1971, named as plaintiffs employees of the Board of Education and the Department of Social Services, and except for one plaintiff in the instant case, these plaintiffs are also employed by these same two agencies.

In a memorandum opinion by Judge Motley in the Monell case, the Court determined that the Monell case could be maintained as a class action, including as plaintiffs the "numerous women employees in the City of New York's many agencies". 357 F. Supp. 1051 (1972).

After Judge Knapp dismissed this case, the defendants in Monell moved to dismiss the complaint and Judge Metzner dismissed the complaint, 394 F. supp. 853 (S.D. N.Y., 1975). This Court affirmed 532 F. 2d 259 (1976) and certiorari has been granted.

This Court affirmed the decision in Monell that the requests for injunctive and declaratory relief were moot since the Department has changed its maternity leave policy in the fall of 1971 and the Board of Education similarly changed its bylaws, effective September 1, 1973. See also Locke v. Board of Public

Instruction of Palm Beach Co. 499 F. 2d 359 (5th Cir. 1974); Guelich v. Mounds View Independent Pub. Sch. Dist. No. 621, 334 F. Supp. 1276 (D. Minn., 1972).

This Court in Monell concluded that the 1972 Amendment to Title VII does not apply retroactively so as to permit an award of back pay against the city. The Court also concluded that any attempt to use §1983 as a basis of obtaining monetary relief against the named City officials in their official capacity would circumvent the decision in Monroe v. Pape, 365 U.S. 167 (1961). The Court distinguished this case from La Fleur, supra and Green v. Waterford, 474 F. 2d 629 (1973) cases and held that their decision had no binding precedent as to damages under the Civil Rights Act, since no attention had been called in those cases to the lack of subject matter jurisdiction.

A comparison of the complaint - Monell (218a-231a) and the instant case shows that the same class is alleged to be represented as in the instant case. The defendant agencies are the same in both cases and the subject matter of the plaintiffs' causes of the action 7 through 11 in the instant case, raised the same issues raised by the Monell case. Appellants' allegation that the relief sought in Monell is different from this case is without foundation.

The plaintiffs in Monell sought declaratory and injunctive relief and damages including but not limited to

wages lost. In considering the nature and purpose of backpay, the courts have emphasized the broad remedial purposes behind the Civil rights legislation, of which VII is a part, have said backpay is equitable and compensatory in nature and that the purpose of Title VII is to make persons whole for injuries suffered on account of employment discrimination, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and that since backpay is a form of equitable relief, it may be awarded even if a plaintiff has not requested it, Robinson v. Lorillard, 444 F. 2d 791 (4th Cir. 1971), cert. dismd. 404 U.S. (1972). Backpay of course would include more than just salary. It would include other benefits lost during the alleged period of alleged discrimination including seniority and the loss of opportunity during the period. See Satty v. Nashville Gas Co., 384 F. Supp. 765 (D.C. Tenn., 1974), affd. 522 F. 2d 855 (6th Cir. 1975) Meadows v. Ford Motor Co., 518 F. 2d 935 (6th Cir. 1975). Thus, the relief sought by the plaintiffs in Monell and rejected by the Court is being sought by members of the same class.

Appellants request for discovery is unfounded. There is no information which appellants do not have which has a bearing upon the legal aspects of this case. What appellants are attempting to do is to prove what is not in their complaint and which complaint they had an opportunity to amend which they refused.

This Court has the power to affirm the dismissal of the complaint on grounds other than those stated by the district judge. In Dandridge v. Williams, 397 U.S. 471 (1970), the Supreme Court in footnote 6, at p. 475-6, said:

> "It is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower Court or an insistence upon matter overlooked or ignored by it."

See also Lum Wan v. Esperdy, 321 F. 2d 123, 126 (2d Cir. 1963), and Helvering v. Gowran, 302 U.S. 238, 245 (1937).

CONCLUSION

WHEREAS APPELLANTS HAVE DECLINED TO REPLEAD TO SHOW SEX DISCRIMINATION, AND THE CITY'S PLANS ARE IN FULL COMPLIANCE WITH THE APPLICABLE LAWS AND REGULATIONS, THE DISTRICT COURT'S ORDER DISMISSING THE COMPLAINT SHOULD BE AFFIRMED.

Dated: New York, New York
May 17, 1977

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel of
The City of New York
1555 Municipal Building
New York, N.Y. 10007
Tel. No. 212-566-0197
Attorney for Defendants-
Appellees

The City of N.Y.; Abraham Beame, as Mayor of the City of New York; Harry Bronstein, as City Personnel Director; New York City Health and Hospitals Corporation; New York City Off-Track Betting Corporation; Joseph Monserrat, Seymour P. Lachman, Isaiah E. Robinson, Jr., Mary E. Meade, Constituting The Board of Education of the City of New York

DAVID W. FISHER,
of Counsel.

321-1M-421040(53)

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

BRIAN SUGDEN

being duly sworn, says, that on the 18TH day of MAY, 1977 at No. 30 E. 42ND ST. in the Borough of MAN'H. in The City of New York, he served ~~three~~ 2 copies of the annexed BRIEF upon RABINOWITZ, BOUDIN & STANDARD Esq., the attorney for the APPLTS. in the within entitled action by delivering ~~three~~ 2 copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 18 day of MAY, 19 77

Brian Sugden

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY, 1977, he served the annexed BRIEF upon TRUBIN, SILLCOCKS, etc. Esq., the attorney for the C.H.I. herein by depositing ~~2~~ copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 375 PARK AVE. in the Borough of MAN'H., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 18 day of MAY, 1977

SAUL L. COHEN
Notary Public, State of New York
No. 03-5747100
Qualified in Bronx County
Commission Expires March 30, 1978

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY, 1977, he served the annexed BRIEF upon BEND, SCHLESINGER, SCHULMAN, ABRAMSON, etc. Esq., the attorney for the D.C. 37 herein by depositing ~~2~~ copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 350 - 5TH AVE. in the Borough of MAN'H., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 18 day of MAY, 1977

SAUL L. COHEN
Notary Public, State of New York
No. 03-5747100
Qualified in Bronx County
Commission Expires March 30, 1978

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY, 1977, he served the annexed BRIEF upon JULIUS TODDL Esq., the attorney for the DC. 37 herein by depositing 2 COPIES ~~a copy~~ of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 140 PARK PLACE in the Borough of MANH., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 18 day of MAY, 1977

SAUL L. COHEN Notary Public, State of New York No. 03-5747100 Qualified in Bronx County Commission Expires March 30, 1978

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY, 1977, he served the annexed BRIEF upon BREED, ABBOTT + MORGAN Esq., the attorney for the BLUE CROSS herein by depositing 2 COPIES ~~a copy~~ of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 1-CHASE MANH. PLAZA in the Borough of MANH., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 18 day of MAY, 1977

SAUL L. COHEN Notary Public, State of New York No. 03-5747100 Qualified in Bronx County Commission Expires March 30, 1978

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY, 1977, he served the annexed BRIEF upon HARTMAN + CRAVEN Esq., the attorney for the DC. 37 WELFARE FUND herein by depositing 2 COPIES ~~a copy~~ of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 150 E. 58th ST. in the Borough of MANH., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 18 day of MAY, 1977

SAUL L. COHEN Notary Public, State of New York No. 03-5747100 Qualified in Bronx County Commission Expires March 30, 1978

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY, 1977, he served the annexed BRIEF upon EDW. W. NORTON Esq., the attorney for the N.Y.C.H.A. herein by depositing 2 COPIES of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 250 B'WAY in the Borough of MANH., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 18 day of MAY, 1977

SAUL L. COHEN
Notary Public, State of New York
No. 03-5747100
Qualified in Bronx County
Commission Expires March 30, 1978

Bruce Garner

Form 323-50M-701067(75) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

BRUCE GARNER being duly sworn, says that on the 18 day of MAY, 1977, he served the annexed BRIEF upon MIRKIN, BARRE, SALTZSTEIN, etc. Esq., the attorney for the UFT, etc. herein by depositing 4 COPIES of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 98 CUTTER MILL RD. in ~~the Borough of~~ GREAT NECK, ~~City of~~ New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 18 day of MAY, 1977

SAUL L. COHEN
Notary Public, State of New York
No. 03-5747100
Qualified in Bronx County
Commission Expires March 30, 1978

Bruce Garner

Form 323-50M-701067(75) 346